IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO.: 14/2019

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant
on behalf of	
SOUTH AFRICAN JEWISH BOARD OF DEPUTIES	
and	
BONGANI MASUKU	First Respondent
and	
CONGRESS OF SOUTH AFRICAN TRADE UNIONS	Second Respondent
SOUTH AFRICAN HOLOCAUST AND GENOCIDE FOUNDATION	First *Amicus Curiae*
PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Second *Amicus Curiae*
FREEDOM OF EXPRESSION INSTITUTE	Third *Amicus Curiae*
MEDIA MONITORING AFRICA	Fourth *Amicus Curiae*
RULE OF LAW PROJECT	Fifth *Amicus Curiae*

WRITTEN SUBMISSION OF FIFTH *AMICUS CURIAE*

TABLE OF CONTENTS

Introduction	3
Section 16(2) of the Constitution is framed conjunctively	3
Section 10 of the Equality Act is ambiguous	4
Only the conjunctive test for hate speech complies with the Constitution	5
The founding values are essential to the adjudicative exercise	8
The founding value of non-racialism has wide scope	10
Non-racialism in the proper assessment of hate speech	11
A different standard in the court *a quo*	13
Conclusion	15
Bibliography	16

INTRODUCTION

1. The Court admitted the Fifth Amicus, the Rule of Law Project (**"the RoLP"**) on 16 July 2019 and directed that it file written submissions relating to the following issues raised in its application for admission as amicus:

   1.1. The appropriate interpretation of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) (**"the Equality Act"**).

   1.2. The centrality of the value of non-racialism, entrenched in section 1(b) of the Constitution, together with the right to be treated equally before the law contained in section 9(1) – to any interpretive or adjudicative exercise the court or other tribunals undertake.

2. These issues are interconnected with the supremacy of the Constitution and the Rule of Law, entrenched in section 1(c) of the Constitution. First, the proper interpretation of section 10 of the Equality Act depends upon both the scope of the constitutional bar on hate speech and the imperative that legislation be consistent with the Constitution. Second, the value of non-racialism demands that the judicial assessment of potentially prohibited speech uphold the substantive equality of all citizens, regardless of race.

SECTION 16(2) OF THE CONSTITUTION IS FRAMED CONJUNCTIVELY

3. One of the imperatives of the Rule of Law is legal certainty, otherwise stated as the ability of citizens to know what the law requires of them with reasonable clarity. This means the law itself must be clear, accessible and understandable.[1] Furthermore, the Constitution establishes the standards of the legal system and in so doing provides impetus for legal certainty: All law

---

[1] In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), Mokgoro J noted, at para 102 of her concurring judgment, that "[t]he need for accessibility, precision, and general application flow from the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law."

must be consistent with its spirit and provisions, and this requirement of consistency allows many a reasonable expectation that if they accord their behaviour with the Constitution, they would be according their behaviour with the law in general.

4. Section 16(2)(c) of the Constitution provides (**"the constitutional definition of hate speech"**):

   > [The right in subsection (1) does not extend to] advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. [emphasis added]

5. The constitutional definition of hate speech is framed conjunctively. This means that expression must amount to advocacy of hatred, and be based on race, ethnicity, gender or religion, and constitute incitement to cause harm, to fall outside the ambit of expression protected by section 16(1).

6. Thus, expression that falls outside the ambit of section 16(2) is protected. In the court a quo, the SCA held that:

   > The contention that a more extensive definition of hate speech can be justified under s 36 is at the least debatable as s 16(2) provides an internal limitation clause.[2]

SECTION 10 OF THE EQUALITY ACT IS AMBIGUOUS

7. Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) (**"the Equality Act"**) provides (**"the Equality Act's definition of hate speech"**):

   > *Subject to the proviso in section 12, no* person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

[2] *Masuku and Another v South African Human Rights Commission* 2019 (2) SA 194 (SCA), at 199

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.

8. The Equality Act itself contains no words explicitly indicating whether its definition of hate speech must be read and construed conjunctively or disjunctively. It has fallen to the High Court to determine whether the test in section 10(1) of the Equality Act should be read disjunctively or conjunctively. We turn to address the conflicting case law and the reasons why only a conjunctive test is consistent with the Constitution.

ONLY THE CONJUNCTIVE TEST FOR HATE SPEECH COMPLIES WITH THE CONSTITUTION

9. The Eastern Cape Division of the High Court in *Herselman v Geleba* (**"the *Herselman* approach"**) held that the Equality Act's definition of hate speech must be construed disjunctively for the following reasons:

> If one has regard to the purpose of the Act, the object of the Act and the interpretation clause it militates against the acceptance of the conjunctive approach. If one were to adopt a conjunctive approach then racially discriminatory words which are clearly hurtful and even harmful, which are directed at an individual may not fall within the ambit of the Act simply because they may not per se promote or propagate hatred because they were not uttered in a group context. [3]

10. In *South African Human Rights Commission v Khumalo* (**"the *Khumalo* approach"**) the equality court held that the decision in the *Herselman case* was clearly wrong and held that the list of requirements in S10(1)(a-c)of PEPUDA must be read conjunctively and not disjunctively, and that the factor of "incitement" must be present in the prohibited utterances. The court stated the following:

[3] [2011] ZAEQC 1 at page 18.

Plainly, section 10 of the Equality Act must be read consistently with section 16 of the Constitution. In order to achieve that result, all parties are agreed, that all three subsections of section 10(1) must be read conjunctively rather than disjunctively to achieve the alignment that produces that consistency. As a result the factor of "incitement' must be present in the prohibited utterances.

There are, however, decisions to the contrary. In *Herselman v Geleba [2011] ZAQC 1,* an appeal from a Magistrate's Equality court to the Eastern Cape High Court held that section 10(1) should read disjunctively. However that decision did not consider the impact of section 16(2)(c) of the Constitution. For that reason, in my view, having omitted an important factor that had to be considered, the decision is unsafe, and for further reasons, is with respect, clearly wrong. Furthermore. In *SAHRC v Qwelane 2018(2) SA 149 (GJ) at [53] P176E* it was held that incitement need not be proven for all of the Section 10(1) subsections because, ostensibly, section 10(1) is wider than section 16 of the Constitution. In my view this conclusion cannot be correct as the effect of Section 16 is to establish the perimeter of what may be proscribed in section 10(1).

Absent consistency with section 16 of the Constitution, the section 10(1) provisions would be unconstitutional. Section 2(b)(v) of the Equality Act expressly subordinates the Equality Act to section 16(2)(c). The view that section 10(1) be disjunctively read is also espoused by authors of Constitutional Law of South Africa: (Juta) (CLOSA) OS 06- 08 ch 42 p87, but they too, assume a disjunctive reading without explaining why it is consistent with section 16. As a result, in my view, the contentions on behalf of the parties in this matter are therefore well made and I endorse them and do not follow these decisions.[4]

---

[4] 2019 (1) SA 289 (GJ), at 314-315

11. On the meaning of the term "incitement", the authors of Constitutional Law of South Africa state that:

    The use of the word 'incitement' indicates that the speech must instigate or actively persuade others to cause harm.[5]

12. As a result, there is an inconsistency in precedent between two divisions of the High Court. As the law stands, speech that does not offend the constitutional definition of hate speech may still fall short of the requirements of the Equality Act and attract civil sanctions. In our submission, this inconsistency undermines legal certainty and falls to be settled by this Court.

13. We further submit that the *Khumalo* approach is the only constitutionally compliant interpretation of section 10(1) of the Equality Act. This is so, as Sutherland J observed, because the constitutional definition of hate speech is framed conjunctively. What is more, the Equality Act itself contemplates a conjunctive construction in section 2(b)(v) of the Act, which provides:

    [T]he objects of this Act are to give effect to the letter and spirit of the Constitution, in particular] the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the constitution […]

14. The *Khumalo* approach implies necessarily that a positive finding of hate speech requires that there must be advocacy of hatred, <u>and</u> that the hatred must be based on race, ethnicity, gender or religion, <u>and</u> the advocacy must constitute incitement cause harm.

15. If the Equality Act's definition of hate speech is construed disjunctively, it will plainly infringe upon constitutionally protected expression.

---

[5] D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* Chapter 42, at page 75-6.

16. The Human Rights Commission (**"the HRC"**) has itself noted in its "Findings of the South African Human Rights Commission regarding certain statements made by Mr Julius Malema and another member of the Economic Freedom Fighters" dated March 2019 (**"the HRC's Malema findings"**)[6] at para 4.2.5 that there exists conflicting precedent regarding whether the Equality Act's definition of hate speech should be read disjunctively or conjunctively.

17. For these reasons, this Court should pronounce expressly that section 10(1) of the Equality Act should be interpreted following the *Khumalo* approach and not the *Herselman* approach.

THE FOUNDING VALUES ARE ESSENTIAL TO THE ADJUDICATIVE EXERCISE

18. Section 1(b) of the Constitution entrenches non-racialism as a founding value of South Africa, and section 1(c) entrenches the supremacy of the Constitution itself as well as the Rule of Law.

19. The principle of non-racialism was a potent rallying cry against the Apartheid regime. It permeates the text of the Freedom Charter, which includes the following proclamations:

> "South Africa belongs to all who live in it, black and white..."; "The rights of the people shall be the same, regardless of race..."; "ALL NATIONAL GROUPS SHALL HAVE EQUAL RIGHTS!"; "All national groups shall be protected by law against insults to their race and national pride"; "ALL SHALL BE EQUAL BEFORE THE LAW!"; and "All laws which discriminate on grounds of race...shall be repealed".[7]

20. In 1991 the ANC produced a document entitled "Constitutional Principles for a Democratic South Africa", which proclaimed that:

[6] Attached the Fifth Amicus Application as "PMVS2".
[7] Adopted at the Congress of the People at Kliptown, 1955.

> A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all.

21. As its pedigree shows, non-racialism is framed as the absence of its opposite — racialism or racial prejudice. Thus, non-racialism cannot be achieved without the acknowledgment that its opposite, racialism, actually exists; that its effects should be countered and its power neutralised. Non-racialism cannot imply some form of judicially imposed collective amnesia or feigned blindness. Rather, it must imply that the Constitution is founded on the imperative to counter and surmount racialism by all lawful means.

22. This Court has pronounced on the role of founding values in a line of cases. In *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* the Court held that:

> These founding values have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid. [8]

23. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* Chaskalson P noted:

> The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself,

[8] 2003 (1) SA 495 (CC) at para 19.

> but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights. [9]

24. Whilst there is no enforceable 'right to the Rule of Law' or 'right to non-racialism' on which relief may be sought directly, in our submission, the courts must draw on these values in the adjudicative exercise, including in the contextualisation of facts and interpretation of legislation.

THE FOUNDING VALUE OF NON-RACIALISM HAS WIDE SCOPE

25. Section 1(b) of the Constitution provides:

> [The Republic of South Africa is one, sovereign, democratic state founded upon the following values:] Non-racialism and non-sexism.

26. The other founding value of the Rule of Law, in section 1(c), itself demands a non-racialist approach to the contextualisation of facts and the interpretation of legislation. This is so because the Rule of Law demands substantive equality before the law. As Albert Venn Dicey, the jurist most associated with the idea of the Rule of Law wrote in his *Law of the Constitution*:[10]

> [The Rule of Law] means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens […]

27. This was accepted by Madala J in his minority in *Van der Walt v Metcash Trading Limited*[11], when the learned judge held that:

> The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the

[9] 2005 (3) SA 280 (CC).
[10] LibertyClassics reprint of 1915 edition, p120
[11] 2002 (4) SA 317, at para 65

Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:

1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
3. the legal protection of certain basic human rights.

28. This commitment to equal application of the law regardless of the inborn characteristics of citizens is not only stated as founding values but is expressed in terms of the section 9(1) right to equality before the law. This provision states:

> Everyone is equal before the law and has the right to equal protection and benefit of the law.

NON-RACIALISM IN THE PROPER ASSESSMENT OF HATE SPEECH

29. In Khumalo, Sutherland J expresses the prevailing social dynamics in the following terms:

> South African society is, manifestly, a community that exhibits significant social strain in which, amongst other distinctions, we are marked off and categorised by race and personal appearance. A significant inter-racial tension exists, derived from several circumstances, not least from inequality and the persistence of some degree of inter-racial hostility. This unhappy and regrettable condition is our historical legacy. The Constitution has proclaimed that we recognise the fractured character of our community and set about transforming our society towards the goal that unequivocally repudiates inter-racial hostility so that we may build a nation upon a consensus that every South African deserves dignity and that our whole community, through sharing resources and through respect for one another, can experience social cohesion.[12]

[12] 2019 (1) SA 289 (GJ), at 315-316

30. Sutherland J adopted an expressly non-racialist approach to the assessment of hate speech. The learned judge considered "among the more complex and controversial value choices" the differential treatment of hate speech by a "person from a marginalised community" compared to a "person who is understood to be a member of a dominant community", and the notion to condone the former and condemn the latter.[13]

31. This notion was expressed at a press conference of the HRC on 27 March 2019. Dr Shanelle van der Berg of the HRC made the following remarks:

> [The Constitutional Court] takes into account the fact of who utters the word, the perpetrator, makes a difference and who receives the insult or the hate speech makes a difference. Clearly the Constitutional Court is of the view that certain words and expressions will depend on whether it is uttered by a white person or a black person and against a white person or a black person. That is very important to take into account.

32. The court in Khumalo rejected this approach and held that:

> In South Africa, however, our policy choice is that utterances that have the effect of inciting people to cause harm is intolerable because of the social damage it wreaks and the effect it has on impeding a drive towards non-racialism. The idea that in a given society, members of a 'subaltern' group who disparage members of the 'ascendant' group should be treated differently from the circumstances were it the other way around has no place in the application of the Equality Act and would indeed subvert its very purpose. Our nation building project recognises a multitude of justifiable grievances derived from past oppression and racial domination. The value choice in the Constitution is that we must overcome the fissures among us. That cannot happen if, in debate, however robust, among ourselves, one section of the population is licensed to be condemnatory because its members were the victims of oppression, and the other section, understood to be, collectively, the former oppressors are disciplined to remain silent.[14]

[13] 2019 (1) SA 289 (GJ), at 320
[14] 2019 (1) SA 289 (GJ), at 320

33. In our submission, the Khumalo approach is proper and warrants the approval of this court.

A DIFFERENT STANDARD IN THE COURT *A QUO*

34. In the court *a quo* the following statements by Mr Masuku were examined:

> On the same day Mr Masuku posted the following statement on the blog:
>
> 'Hi guys,
>
> Bongani says hi to you all *as we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity*. Every Palestinian who suffers is a direct attack on all of us.'
>
> [Emphasis supplied on the portion allegedly constituting hate speech.]
>
> On 5 March 2009 Mr Masuku made the following three statements as part of his speech at a gathering at the University of the Witwatersrand (Wits):
>
> 'Cosatu has got members here on this campus, we can make sure that for that side it will be hell . . . the following things are going to apply: any South African family, I want to repeat it so that it is clear for everyone, any South African family who sends its son or daughter to be part of the Israeli Defence Force must not blame us when something happens to them with immediate effect . . . .'
>
> And:
>
> 'Cosatu is with you, we will do everything to make sure that whether it is at Wits, whether it is at Orange Grove, anyone who does not support equality and dignity, who does not support the rights of other people must face the consequences even if we will do something that may necessarily be regarded as harm . . . .'[15]

[15] *Masuku and Another v South African Human Rights Commission* 2019 (2) SA 194 (SCA), at 197

35. In the court *a quo*, Dambuza JA held that:

> Threatening or unsavoury words in the statements such as 'bitter medicine', and 'perpetual suffering' are only metaphorical. Even if ethnicity or religion was implied in the blog statement, neither the offensive words nor the blog statement could be considered advocacy of hatred or incitement of harm for the purpose of s 16(2)(c) of the Constitution, particularly in the context in which they were made.[16]

36. In other words, the learned judge of appeal concluded that Masuku's words did not satisfy the definition of hate speech in section 16 of the Constitution, because he regarded those words as merely metaphorical. The RoLP is concerned that a different standard may have been applied to Mr Masuku to excuse his words.

37. Mr Masuku committed COSATU and implicitly himself to doing things that "may necessarily be regarded as harm" to people who do not share his political views. In this context, the group of people targeted by Masuku's statement was the Jewish community in South Africa – a racial and religious group. The holding of the court below that this element of Masuku's speech was protected expression runs counter to the foundational value of non-racialism.

38. The RoLP is concerned that the judgment in the court *a quo* may have treated Jews differently from other racial or religious groups. As such, the RoLP submits that it is appropriate for this Court to provide guidance on the proper application of non-racialism in matters of hate speech.

39. Non-racialism, if it is to mean anything, must imply that government, including the judiciary, will not treat individuals of different races differently for that reason alone. The importance of this principle given South Africa's

---

[16] *Masuku and Another v South African Human Rights Commission* 2019 (2) SA 194 (SCA), at 203

racially discriminatory history cannot be overemphasised. Discriminatory treatment at the hands of the Apartheid state led to the systematic denial of rights. The constitutional prohibition of hate speech should protect all those in South Africa in equal measure. To achieve this objective, our courts should not countenance the distribution of license or silence on grounds of race, especially where prohibited hate speech is concerned.

CONCLUSION

40. For the reasons set out above, the RoLP submits that this Court should adopt a conjunctive reading of section 10(1) of the Equality Act, and one that emphasises the centrality of non-racialism to South Africa's constitutional order.

41. The RoLP does not pray for costs and submits that as an *amicus curiae* it should not be exposed to an adverse costs award.

M OPPENHEIMER

S A NAKHJAVANI

Counsel for the fifth *amicus curiae*

Chambers, Sandton

30 July 2019

BIBLIOGRAPHY

CASES

1. *Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC)
2. *Herselman v Geleba* [2011] ZAEQC 1
3. *Masuku and Another v SAHRC* 2019 (2) SA 194 (SCA)
4. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC)
5. *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)
6. *SAHRC v Khumalo* 2019 (1) SA 289 (GJ)
7. *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317

LEGISLATION

8. The Constitution of the Republic of South Africa
9. The Promotion and Protection of Equality Act, 2000

BOOKS

10. Albert Venn Dicey, *Law of the Constitution*, Liberty Classics (1915)
11. S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds), Constitutional Law of South Africa

DOCUMENTS

12. Constitutional Principles for a Democratic South Africa, 1991
13. Findings of the South African Human Rights Commission regarding certain statements made by Mr Julius Malema and another member of the Economic Freedom Fighters, March 2019
14. Freedom Charter Adopted at the Congress of the People at Kliptown, 1955.